

RECTAL FEEDING, RAPE, AND TORTURE IN THE U.S. INTERROGATION AND DETENTION PROGRAM

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ABSTRACT

Very little attention has been paid to the use of sexual violence against detainees in the “War on Terror;” and, within the broader category of sexual violence, rectal feeding has often been overlooked in comparison to other cases of sexual abuse. Where attention has been paid to sexual violence against detainees, commentators have tended to focus on reports revealing that detainees were being inappropriately touched by female interrogators or stripped and photographed in humiliating and obscene positions. This Comment instead focuses on the use of rectal feeding in the U.S. interrogation and detention program, which has been insufficiently addressed in analyses of U.S. forces’ torture, sexual abuse, and sexual humiliation of detainees after September 11. In so doing, this Comment seeks to uncover the U.S. practice of rectal feeding as rape, map its legal obligations under domestic law while drawing on international human rights jurisprudence, and demonstrate the syllogism that rectal feeding is rape, rape is torture, and thus rectal feeding is torture. Ultimately, I find that the legal and political barriers to holding the perpetrators of rectal feeding accountable stem from the masculinist logic that circumscribes rape to exclude men from the class of victims and to exclude rectal feeding from the crime of torture.

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TABLE OF CONTENTS

I.	Introduction	489
II.	Rectal Feeding in the CIA's Detention and Interrogation Program	491
	<i>a. Medical Status</i>	492
	<i>b. Motivations for Rectal Feeding</i>	495
III.	Rectal Feeding Constitutes Rape Under Domestic and International Law	497
	<i>a. The Medical Necessity Defense Against Recognizing Rape</i>	499
	<i>b. Gender Norms Preventing Recognition of Rape</i>	500
IV.	Subjecting Detainees to Rectal Feeding Constitutes Torture	504
	<i>a. U.S. Interpretations of Rape as Torture</i>	504
	<i>b. Rape as Torture Under § 2340</i>	505
	<i>i. Actus Reus, Under Color of Law, and Custody Elements</i>	506
	<i>ii. Specifically Intended to Inflict Severe Physical or Mental Pain or Suffering</i>	506
	<i>iii. Severe Physical or Mental Pain or Suffering ..</i>	511
	1. Severe Mental Pain or Suffering.....	514
V.	Conclusion.....	517

I. INTRODUCTION

Sexual violence against detainees is at once extremely pervasive and largely unacknowledged. Very little attention has been paid to the use of sexual violence against detainees in the “War on Terror.”¹ Within the broader category of sexual violence, rectal feeding has often been overlooked in comparison to more “extreme” cases of sexual abuse, such as reports revealing that detainees were being stripped and photographed “in shameful and obscene positions”² or “touched inappropriately by female interrogators.”³ Forced nudity in particular has been pervasive and common throughout detention sites⁴ and, according to the George Fay and Anthony Jones report, “nudity as an interrogation technique or incentive to maintain the cooperation of detainees was not a technique developed at Abu Ghraib, but rather a technique which was imported and can be traced through Afghanistan and GTMO.”⁵ Indeed, forced nudity has been the most widely documented form of sexual abuse and humiliation employed by the United States after September 11, which has correspondingly been widely recognized as a form of torture under customary international law.⁶

¹ See PHYSICIANS FOR HUM. RTS., *BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES* 2, 5-7 (2005) (“[T]he very pervasiveness and commonality of the use of forced nudity and other forms of sexual humiliation not only led to the more extreme abuses but created an environment in which even more extreme forms of humiliation and abuse were likely not seen as such”).

² Suzanne Goldenberg & James Meek, *Papers Reveal Bagram Abuse*, *GUARDIAN* (Feb. 17, 2005), <https://www.theguardian.com/world/2005/feb/18/usa.iraq> [<https://perma.cc/WZ7S-X5X6>].

³ PHYSICIANS FOR HUM. RTS., *supra* note 1, at 5; see also Raymond Bonner, *Detainee Says He Was Tortured While in U.S. Custody*, *N.Y. TIMES* (Feb. 13, 2005), <https://www.nytimes.com/2005/02/13/world/middleeast/detainee-says-he-was-tortured-while-in-us-custody.html> [<https://perma.cc/6338-BFSX>].

⁴ PHYSICIANS FOR HUM. RTS., *supra* note 1, at 6-7; see also INT’L COMM. OF THE RED CROSS, *REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT, AND INTERROGATION* art. 3.1, ¶ 25 (2004) (finding forced nudity and sexual humiliation being used at various detention facilities in Iraq).

⁵ MG GEORGE R. FAY, *AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (U) 45* (Aug. 2004) [hereinafter *FAY-JONES REPORT*].

⁶ See *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶¶ 306, 308-12 (Nov. 25, 2006) (“Having forced the female inmates to remain nude . . . in the precarious health

This Comment focuses on the use of rectal feeding in the U.S. interrogation and detention program, which has been insufficiently addressed in analyses of U.S. forces' torture, sexual abuse, and sexual humiliation of detainees after September 11th. However, it is important to note that despite narrowing my analysis to rectal feeding, the multiple and pervasive forms of sexual humiliation and abuse have nevertheless contributed to the environment in which rectal feeding was possibly not seen as what it is: rape.

Furthermore, this Comment acknowledges that the United States is "an international outlaw of major proportions."⁷ It avoids being bound by most of the relevant international agreements on human rights, and it refuses to prosecute its own known torturers.⁸ The applicable international law, unsurprisingly, is strong in principle but weak in practice.⁹ As such, this Comment seeks to uncover the U.S. practice of rectal feeding as rape, map its legal obligations under domestic law while drawing on international human rights jurisprudence, and demonstrate the hypothetical syllogism that rectal feeding is rape, rape is torture, and thus rectal feeding is torture. Ultimately, I find that the legal and political barriers to holding the perpetrators of rectal feeding accountable for rape or torture stem from the fundamental reluctance to identify rectal feeding as rape.

In this Comment, I will first provide an overview of the known instances of rectal feeding in the U.S. interrogation and detention program, the status of rectal feeding in the medical community based on its uses and risks, and the likely motivations for inflicting this procedure on detainees. I will then demonstrate why it constitutes rape under domestic and international law despite two barriers to recognizing it as such: the CIA's purported medical

conditions in which they were, constituted sexual violence in the aforementioned terms"); see also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 10A (Sept. 2, 1998) (finding that forced nudity constitutes an act of sexual abuse).

⁷ CATHARINE A. MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 25 (2006).

⁸ See, e.g., Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES (Aug. 30, 2012), <https://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html> [<https://perma.cc/8LBZ-YKU3>].

⁹ It should be noted, however, that since the writing of this Comment the International Criminal Court (ICC) has authorized an investigation into the situation in Afghanistan, specifically asserting jurisdiction over, *inter alia*, the U.S. interrogation and detention program. For an in-depth discussion of the ICC's jurisdiction over the interrogation and detention program see Jake Romm, *No Home in this World: The Case Against John Yoo Before the International Criminal Court*, 20 INT'L CRIM. L. REV. 862 (2020).

defense and the gender of the victims. Next, I will analyze the U.S. history of recognizing rape as torture, and specifically analyze the Extraterritorial Torture Statute to show that rape, and specifically rectal feeding, meets the required elements for torture.

II. RECTAL FEEDING IN THE CIA'S DETENTION AND INTERROGATION PROGRAM

The partially released Senate Intelligence Committee Report on the CIA's Detention and Interrogation Program mentioned detainees' subjection to "rectal feeding" without medical necessity and disclosed that CIA leadership was on notice that rectal exams conducted with "excessive force," which had led to at least one prisoner's diagnosis of anal fissures, chronic hemorrhoids, and "symptomatic rectal prolapse."¹⁰ CIA operatives subjected at least five detainees to "rectal rehydration and feeding," although there is reason to be skeptical about the accuracy of this figure,¹¹ given that the CIA has historically provided the Senate Torture Committee with inaccurate information and claims about its interrogation techniques,¹² that underreporting is likely due to victims' resulting shame and humiliation,¹³ and allegations that CIA operatives

¹⁰ S. REP. NO. 113-288, at 100 n.584 (2014) [hereinafter SENATE TORTURE REPORT].

¹¹ Dominic Rushe, Ewan MacAskill, Ian Cobain, Alan Yuhas & Oliver Laughland, *Rectal Rehydration and Waterboarding: the CIA Torture Report's Grisliest Findings*, GUARDIAN (Dec. 11, 2014), <https://www.theguardian.com/us-news/2014/dec/09/cia-torture-report-worst-findings-waterboard-rectal> [<https://perma.cc/HGF7-WC3B>] (summarizing the many ways in which the CIA gave inaccurate information to mislead the public and policymakers about its interrogation program).

¹² The Senate Torture Report cites a significant amount of inconsistencies between reality and the CIA's statements, records, and practices. See SENATE TORTURE REPORT, *supra* note 10, at 453 ("In June 2008, the CIA provided information to the Committee in response to a reporting requirement in the Fiscal Year 2008 Intelligence Authorization Act. The CIA response stated that all of the CIA's interrogation techniques 'were evaluated under the applicable U.S. law during the time of their use and were found by the Department of Justice to comply with those legal requirements.' This was inaccurate. Diapers, nudity, dietary manipulation, and water dousing were used extensively by the CIA prior to any Department of Justice review.").

¹³ See Alexa Koenig, *When is a Cavity Search Not a Cavity Search? Rape at Guantánamo*, MEDIUM (Jan. 11, 2017), <https://medium.com/lemming-cliff/when-is-a-cavity-search-not-a-cavity-search-rape-at-guant%C3%A1namo-b2b320af05db> [<https://perma.cc/9MEQ-YLNP>].

covered up their abuse of detainees.¹⁴ Moreover, the Senate Torture Report only covers the CIA's activities, and thus does not address the likelihood that military and other non-CIA personnel administered this procedure.

Even if only five detainees were subject to this practice, the violation still exists: CIA officials committed acts of rape. Specifically, CIA medical officers "pureed" detainee Majid Khan's "lunch tray," consisting of hummus, pasta with sauce, nuts and raisins," and "rectally infused" it by enema;¹⁵ one CIA officer sent an email saying, "we used the largest Ewal [sic] tube we had."¹⁶ The CIA administered rectal rehydration to another detainee "without a determination of medical need" and attempted to justify the "rectal fluid resuscitation" of detainee Abu Zubaydah for "partially refusing liquids."¹⁷ The CIA also administered an enema to detainee Al-Nashiri after a short-lived hunger strike.¹⁸

a. Medical Status

The defense of rectal feeding as medical treatment is instantly questionable due to the Senate Torture Report's recognition that these procedures were done without evidence of medical necessity but as a means of behavioral control.¹⁹ The Physicians for Human Rights provided testimony from numerous leading medical experts who denounced the practice as virtually never used because of its almost universally recognized inefficacy and high risks, such as rectal perforation and infection,²⁰ an inflamed or prolapsed rectum, other damage to the rectum and colon, triggering bowels to empty

¹⁴ See U.S. DEP'T OF DEF., 15-L-1645/DOD, VERBATIM TRANSCRIPT OF COMBATANT STATUS REVIEW TRIBUNAL HEARING FOR ISN 10020, at 166-68 (Apr. 15, 2007) [hereinafter CSRT TRANSCRIPTS FOR ISN 10020].

¹⁵ SENATE TORTURE REPORT, *supra* note 10, at 115.

¹⁶ *Id.* at 100 n.584.

¹⁷ *Id.* at 488.

¹⁸ *Id.* at 73.

¹⁹ *Id.* at 100 n.584.

²⁰ PHYSICIANS FOR HUM. RTS., MEDICAL PROFESSIONALS DENOUNCE "RECTAL FEEDING" AS "SEXUAL ASSAULT MASQUERADING AS MEDICAL TREATMENT" (Dec. 1, 2014), https://s3.amazonaws.com/PHR_other/fact-sheet-rectal-hydration-and-rectal-feeding.pdf [https://perma.cc/K3TK-2PSY].

and incontinence problems, and the consequences associated with food rotting inside the victim's digestive tract.²¹

A coalition of medical physicians and professors stated that the practice "simply doesn't make physiological sense,"²² and thus "there is no current medical reason" for its use.²³ In referring to the CIA's practice, it specified: "Pureed food and nutritional supplements, such as Ensure, should *never* be administered rectally," as the colon cannot absorb pureed food.²⁴ Although the CIA has tried to defend its actions as consistent with medical necessity,²⁵ rectal feeding has little value in sustaining life or administering nutrients, "since the colon and rectum cannot absorb much besides salt, glucose and a few minerals and vitamins."²⁶ The larger U.S. medical community has been unified in its opposition to both rectal feeding, and, to a lesser but nevertheless significant extent, rectal rehydration, as humiliating and barbaric treatment that has "no place . . . in medical treatment today."²⁷

In response to Freedom of Information Act (FOIA) lawsuits, the U.S. government released documents containing guidelines that the head of the CIA's Office of Medical Services (OMS) distributed to personnel assigned to black sites, including both a draft from 2003 marked "draft" and the 2004 Guidelines.²⁸ Both explicitly state that "the rectal tube is an acceptable method of delivery of rehydration fluids" due to staff safety concerns (although these concerns are not elaborated or explained in any way).²⁹ Furthermore, the 2004 Guidelines clarify that "the rectal tube is considered by OMS the first

²¹ Rushe, MacAskill, Cobain, Yuhas & Laughland, *supra* note 11.

²² PHYSICIANS FOR HUM. RTS., *supra* note 20, at 1 (quoting Dr. Steven Field, MD, Clinical Assistant Professor of Medicine, New York University School of Medicine).

²³ *Id.* (citing Dr. Ranit Mishori, Georgetown University School of Medicine).

²⁴ *Id.* (emphasis added).

²⁵ Domenico Montanaro, *Is Rectal Feeding an Actual Modern Medical Practice?*, PBS (Dec. 12, 2014), <https://www.pbs.org/newshour/politics/rectal-rehydration-medical-practice-used-todays-doctors> [<https://perma.cc/LV2Q-V9BQ>] (reporting that former CIA Director Michael Hayden strongly defended the legitimacy of medical practice despite overwhelming evidence to the contrary).

²⁶ Rushe, MacAskill, Cobain, Yuhas & Laughland, *supra* note 11.

²⁷ Montanaro, *supra* note 25 (quoting Dr. Howard Markel, Medical Historian, University of Michigan).

²⁸ Katherine Hawkins, *Medical Complicity in CIA Torture: Then and Now*, JUST SEC. (July 1, 2016), <https://www.justsecurity.org/31762/medical-complicity-cia-torture/> [<https://perma.cc/2WZD-KY34>].

²⁹ OMS GUIDELINES ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE RENDITION, INTERROGATION, AND DETENTION 10 (2004) [hereinafter OMS GUIDELINES].

line intervention" for rehydration until the detainee resumes oral hydration.³⁰ The updated OMS guidelines note that forcible intervention may be undertaken if the detainee refuses nutrients and subsequently loses sufficient weight.³¹ "Forced feeding is *usually* accomplished using a nasogastric tube," but OMS suggests that rectal feeding could also accomplish the same goal, although it warns that "the rectal tube is not an efficient way to deliver nutrients other than fluids, salts and glucose, and thus is not recommended for feeding."³² However, the combination of suggesting that forced feeding is not always accomplished by a nasogastric tube and then merely commenting on rectal feeding's efficiency limitations amounts to a tacit approval of the procedure—in contrast to the DOJ's Office of Legal Counsel's denial that it was an authorized interrogation technique.³³ The CIA's June 2013 Response defended the use of rectal rehydration as a "well acknowledged medical technique," but did not address the use of rectal feeding, likely because of liability concerns.³⁴ One CIA attorney was asked to address the allegations that rectal exams were conducted with "excessive force" on two detainees at Detention Site Cobalt, and CIA leadership (including General Counsel Scott Muller and DDO James Pavitt) were notified of these allegations; CIA records have yet to indicate any response.³⁵ Furthermore, the CIA's Chief of Interrogations endorsed rectal rehydration and feeding as a way to exert "total control over the detainee" and ordered it against at least Khalid Sheikh Mohammed (KSM).³⁶ It is thus doubtful that "the approval process for rectal feeding left the [CIA's] chain of command."³⁷

³⁰ *Id.* at 22.

³¹ *Id.* at 23.

³² *Id.* (emphasis added).

³³ Press Release, Dianne Feinstein, U.S. Senator, Fact Check: CIA's Use of Rectal Rehydration, Feeding Not Medical Procedures (Dec. 12, 2014), <https://www.feinstein.senate.gov/public/index.cfm/2014/12/fact-check-cia-s-use-of-rectal-rehydration-feeding-were-not-medical-procedures> [<https://perma.cc/UD5R-RZBH>].

³⁴ SENATE TORTURE REPORT, *supra* note 10, at 100 n.584.

³⁵ *Id.*

³⁶ *Id.* at 82 (footnote omitted).

³⁷ Steven Nelson, *Detainee Fed Through Rectum Was Raped, His Attorney Says*, U.S. NEWS (Dec. 10, 2014), <https://www.usnews.com/news/articles/2014/12/10/detainee-fed-through-rectum-was-raped-his-attorney-says> (quoting statement from Lawrence Wilkerson, chief of staff to then-Secretary of State Colin Powell).

b. Motivations for Rectal Feeding

Indeed, given its minimal nutrition benefits and significant risks, it is unsurprising that the Senate Torture Report included evidence of the CIA's use of rectal feeding and rehydration as a mechanism for asserting control and inflicting pain and suffering. To reiterate, the CIA's Chief of Interrogations ordered the rectal rehydration of at least KSM without any determination of medical need, and explicitly described rectal procedures as a method of illustrating the interrogator's "total control over the detainee."³⁸ CIA medical officers further described rectal procedures as a way to "'clear a person's head' and effective in getting KSM to talk" at Detention Site Cobalt.³⁹ In the medical staff's discussion of "rectal rehydration as a means of behavior control," one medical officer wrote that although IV infusion is safe and effective, the collective officers "'were impressed with the ancillary effectiveness of rectal infusion'" in controlling the detainee, particularly in ending the water refusal.⁴⁰ The same medical officer provided a description of the procedure in the email to his colleagues: "[r]egarding the rectal tube, if you place it and open up the IV tubing, the flow will self-regulate, sloshing up the large intestines," and, referencing the actions of a different medical officer, said, "[w]hat I infer is that you get a tube up as far as you can, then open the IV wide. No need to squeeze the bag—let gravity do the work."⁴¹ The same email chain included another application of the technique, in which "we used the largest Ewal [sic] tube we had."⁴² The CIA threatened three detainees with rectal hydration, which underscores its non-medical purpose of displaying the interrogator's dominance and the detainees' powerlessness.⁴³

Moreover, Majid Khan's case in particular highlights the punitive nature of the procedure: Khan accepted nasogastric and IV feeding and was even allowed to infuse fluids and nutrients himself, but nevertheless, without any evidence that he was resisting other feeding methods or posing a "safety concern" to medical staff (as provided in the 2004 OMS Guidelines), the CIA chose to rectally

³⁸ SENATE TORTURE REPORT, *supra* note 10, at 82.

³⁹ *Id.* at 83.

⁴⁰ *Id.* at 100 n.584.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

force-feed him with Ensure and his own pureed lunch.⁴⁴ In the released FOIA transcripts from the Combatant Status Review Tribunal (CSRT) of Zayn Al Abidin Muhammad Husayn (Abu Zubaydah) in Guantánamo, he described being *denied* food and then subjected to forced feeding of exclusively Ensure.⁴⁵ In his testimony, Khan recounted that in May 2003 U.S. interrogators “ripped my clothes and searched my whole naked body and put their fingers in my rectum till I would scream in pain. To this day, I bleed from my rectum occasionally.”⁴⁶ Khan alleged that from September to October of 2004, a doctor would force feed him “to humiliate me” and then “cover-up” his actions:

[The doctor] used all kind of method to torture me in name of health reason He would put tubes in my rectum and put lot of food in it, so I would use toilet bucket right away, and then he can lie in his reports that the food just came out, is the food that just digested after nose feeding. So for four straight weeks he nose fed me once or twice in a day and then torture me . . . and rectum feeding on only reporting hours or days to do cover-up [H]e used regular size hose in my rectum and turned on the water from the faucet. Or he used the sharp, the beginning of the tube and with that he used to rub hot sauce around the tube [sic]⁴⁷

These horrific reports coupled with the overwhelming lack of evidence that rectal feeding is a legitimate medical procedure leave little room for doubt as to the motivations underlying rectal feeding: to intimidate, humiliate, and inflict pain and suffering on detainees in pursuit of the broader counterterrorism objectives of the U.S. interrogation and detention program.

⁴⁴ *Id.* at 100 n.584, 114-15.

⁴⁵ U.S. DEP'T OF DEF., 15-L-1645/DOD, VERBATIM TRANSCRIPT OF COMBATANT STATUS REVIEW TRIBUNAL HEARING FOR ISN 10016, at 138 (Mar. 27, 2007) [hereinafter CSRT TRANSCRIPTS FOR ISN 10016].

⁴⁶ CSRT TRANSCRIPTS FOR ISN 10020, *supra* note 14, at 166.

⁴⁷ *Id.* at 171.

III. RECTAL FEEDING CONSTITUTES RAPE UNDER DOMESTIC AND INTERNATIONAL LAW

The use of rectal feeding in the U.S. interrogation and detention program constitutes rape, despite the United States' reluctance to recognize it as such due to its history of assuming men cannot be raped and its masking of rape as medical treatment. A survey of statutory definitions of sexual assault and rape is instructive here. The Torture Victim Relief Act of 1998 (TVRA), without explicitly defining rape, recognized that men can also be victims of rape and other forms of sexual violence.⁴⁸ The Prison Rape Elimination Act of 2003 defined rape to include "sexual assault with an object," which, in turn, was defined as "the use of any hand, finger, object, or other instrument to penetrate, however slightly, the genital or anal opening of the body of another person."⁴⁹ Although these statutory definitions of rape and sexual assault excluded "the use of a health care provider's hands or fingers or the use of medical devices in the course of *appropriate* medical treatment,"⁵⁰ rectal feeding, both as a general practice and as used in the context of the U.S. interrogation and detention program, does not constitute appropriate medical treatment.⁵¹ The DOJ had defined rape, forcible rape, forcible sodomy, and sexual assault inconsistently⁵² until 2012, when it officially defined rape as "[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."⁵³ Even so, the Military Commissions Act of 2006 amended the War Crimes Act of 1996 to include, with retroactive applicability, rape as prohibited conduct constituting "a

⁴⁸ Torture Victims Relief Act of 1998, Pub. L. No. 105-320, § 7(b), 112 Stat. 3016 [hereinafter TVRA].

⁴⁹ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 10(9)(A)-(C), § 10(10), 117 Stat. 972.

⁵⁰ *Id.* § 10(12)(B) (emphasis added).

⁵¹ See PHYSICIANS FOR HUM. RTS., *supra* note 20.

⁵² See generally U.S. DEP'T OF JUST., NCJ-163392, SEX OFFENSES AND OFFENDERS (1997) (showing that the DOJ inconsistently applied definitions of sexual offenses when compiling data on rape and sexual assault).

⁵³ Off. Pub. Affs., *An Updated Definition of Rape*, U.S. DEPT JUST. ARCHIVES (Jan. 6, 2012), <https://www.justice.gov/archives/opa/blog/updated-definition-rape> [<https://perma.cc/CQQ5-P7DJ>].

grave breach" of common Article 3 of the Geneva Conventions.⁵⁴ It therefore retroactively, as of Nov. 26, 1997, defined rape as:

The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.⁵⁵

Furthermore, human rights courts and ad hoc tribunals have consistently held that rape can take multiple and varied forms and methods, and that non-consensual sexual penetration constitutes rape under international law.⁵⁶ In the pivotal *Akayesu* case of 1998, the International Criminal Tribunal of Rwanda held that "acts of sexual violence include forcible [non-consensual] sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity."⁵⁷ Since then, multiple courts and tribunals have again held that sexual rape can "also be understood as act [sic] of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects."⁵⁸ Notably, the Inter-American Court of Human Rights (IACHR) also held that "finger vaginal 'inspections'" constituted "sexual rape."⁵⁹ In both the 2001 and 2002 *Foca* trial and appeal, the International Criminal Tribunal for the former Yugoslavia (ICTY) provided a consistent yet more

⁵⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(B)(d)(1), 120 Stat. 2600.

⁵⁵ *Id.* at § 6(b)(B)(d)(1)(G).

⁵⁶ Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgement, ¶¶ 127, 151 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) [hereinafter *Foca Appeals Judgment*] ("Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.").

⁵⁷ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 10A (Sept. 2, 1998).

⁵⁸ Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 310 (Nov. 25, 2006); *see also* Aydin v. Turkey, No. 57/1996/676/866, ¶ 83 (Sept. 25, 1997), <http://hudoc.echr.coe.int/fre?i=001-58371> [<https://perma.cc/FSL8-K4US>] (noting that penetration is involved, consistent with rape).

⁵⁹ Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶¶ 309-312 (Nov. 25, 2006) (defining rape as any non-consensual sexual penetration and stating that it may constitute a violation of the prohibition against torture under Article 3 of the European Convention).

precise definition of rape, adding to the weight of this understanding as customary international law:

the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.⁶⁰

Here, the rectal feeding and rehydration procedures certainly meet the penetration and non-consent criteria of the accepted domestic and international understanding of rape: CIA officers subjected detainees to non-consensual anal penetration with a foreign object. However, the purported medical justification of the acts and the gender of the victims have impeded the proper recognition of the acts as rape, which, in turn, impede its recognition as torture.

a. The Medical Necessity Defense Against Recognizing Rape

Rectal feeding is widely discredited as medically justified—beyond the Bush administration and the CIA, there are no available sources that argue in favor of its use—and the Senate Torture Report concluded that all of the known instances of rectal feeding in the U.S. interrogation and detention program were done “without evidence of medical necessity.”⁶¹ As was previously noted, the OMS Guidelines released under FOIA do not “recommend” rectal feeding of substances other than those listed, and in that sense tacitly seem to allow the practice.⁶² However, even if the CIA officers who inflicted this procedure on detainees believed it was approved

⁶⁰ Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgement, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002); *see also id.* ¶¶ 128-29 (emphasizing the trial chamber's holding that the absence of consent is the *conditio sine qua non* of rape, and that although force or threat of force provides clear evidence of non-consent, force is not an element *per se* of rape).

⁶¹ SENATE TORTURE REPORT, *supra* note 10, at 100.

⁶² OMS GUIDELINES, *supra* note 29, at 23.

under OMS Guidelines, they could not have reasonably believed in its medical necessity given the U.S. medical community's unified opposition to the practice and the medical officers' incriminating emails of their sadistic motivations.⁶³ Furthermore, the UN Special Rapporteur on Torture has noted that claims of "good intentions" by medical professionals will not prevent an act from constituting torture under the U.N. Convention Against Torture (CAT), and that "dubious grounds of medical necessity" have historically been used to justify intrusive and non-consensual procedures.⁶⁴ The medical necessity defense is therefore unreasonable in this case.

b. Gender Norms Preventing Recognition of Rape

At no point in the Senate Torture Report do the terms "sex," "sexual," or "sexualized" appear in relation to the direct treatment of detainees. Sexual abuse is only mentioned when referring to threats of sexually abusing the mother of a detainee.⁶⁵ The Senate Committee failed to see rectal feeding as a form of sexual assault, presumably because of a reluctance to implicate the CIA in a program of systematic rape—a reluctance which is enabled by a flawed understanding of who can be raped and what rape can be.⁶⁶ The deeply embedded gender norms and stereotypes surrounding rape form barriers to the recognition of rectal feeding as rape—by both the perpetrators, the public, and often even the victims. To

⁶³ The argument that medical personnel should have been aware that such actions violated their Hippocratic Oath reinforces this view, which has been addressed by other analyses. *See generally* JOSEPH AMON, *ABUSING PATIENTS: HEALTH PROVIDERS' COMPLICITY IN TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT* (2009) (providing an overview of the various ways in which medical personnel enable and contribute to torture); Helen McColl, Kamaldeep Bhui & Edgar Jones, *The Role of Doctors in Investigation, Prevention and Treatment of Torture*, 105 J. ROYAL SOC'Y MED. 464 (2012) (discussing medical complicity in torture).

⁶⁴ Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 31-34, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

⁶⁵ SENATE TORTURE REPORT, *supra* note 10, at 70.

⁶⁶ *See* Sharif Mowlabocus, *Rectal Feeding is Rape – But Don't Expect the CIA to Admit It*, CONVERSATION (Dec. 12, 2014) (arguing that the CIA's reluctance to see their actions as sexual abuse stems from their own deep-seated perceptions about homosexuality and fear of being called "queer"), <https://theconversation.com/rectal-feeding-is-rape-but-dont-expect-the-cia-to-admit-it-35437> [<https://perma.cc/2AS2-DQ5W>].

demonstrate this, it is useful to first analyze rape beyond its domestic and international legal definitions.

Rape is necessarily physical and sexual; while physical assault may entail serious emotional consequences for its victims, the sexualization of assault that occurs in rape amplifies those consequences. It is a demonstration of power “to defile, degrade, and shame in addition to inflicting physical pain. . . . [T]o do something worse than to assault.”⁶⁷ Rape is always sexual, not because it must involve sexual impulses or desire (which are not required), but because of its underlying social sexing: it is “exercised by a (social) man against a (social) woman.”⁶⁸ Rape, regardless of the biological sexes of the individuals involved, is an act of feminizing the victim and correspondingly masculinizing the perpetrator by exploiting or enjoying the powerlessness and ascribed inferiority of the victim.⁶⁹ Rape differentiates and subordinates the victim as a social woman, and as such it reinforces and is reinforced by the current gender hierarchy. Rape is therefore not simply a physical assault on the body. Because of the social meaning surrounding the act of rape, and the social meaning surrounding the genitals,⁷⁰ rape must be read as a sexualized attack. Indeed, male victims frequently experience rape as feminizing,⁷¹ although the extent to which this is common is unknown because of the assumption that men cannot be raped, which simultaneously silences victims, prevents vocal victims from being heard, and feminizes them as homosexual or girlish; they are thus “invisible and gendered female.”⁷²

Rectal feeding departs from the traditional and misinformed understandings of rape as desire-driven, forced intercourse against female victims, and therefore it risks being misidentified as

⁶⁷ MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 45 (1989).

⁶⁸ Monique Plaza, *Our Damages and Their Compensation Rape: The Will Not to Know of Michel Foucault*, J. FEMINIST SOC. & POL. THEORY, Summer 1981, at 25, 28-29.

⁶⁹ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 178 (1989).

⁷⁰ In most but not all societies (e.g., the Dayak community of Gerai), genitals and sexuality carry immense social meaning, such that rape is often experienced as both a violation of one’s bodily autonomy and a violation of the constitutive element of the self. See Holly Henderson, *Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention*, 22 BERKELEY J. GENDER, L. & JUST. 225, 251 (2007) (noting that rape may be experienced as a violation “of all sense of oneself, of some inner, private and intimate space”).

⁷¹ Plaza, *supra* note 68, at 28.

⁷² MACKINNON, *supra* note 7, at 26.

something other than one of the many forms of rape. Despite this failure to conform to the traditional view of rape, rectal feeding nevertheless presents an unambiguous case of rape as a sexualized act of enjoying and amplifying the detainee's powerlessness and ascribed inferiority by defiling, degrading, and humiliating the detainee in addition to inflicting physical pain. There is clear evidence that rectal feedings were administered for these purposes: the Senate Torture Report revealed medical officers admitting to administering the procedure despite its acknowledged medical inefficiency, taking steps to make the procedure more painful, using it as a threat to intimidate and coerce other detainees, and employing it as a method of demonstrating "total control over the detainee"; released CSRT transcripts showed detainee testimony of blatantly unnecessary, humiliating, and horrific rectal penetration under the pretense of necessary medical treatment.⁷³ It is nevertheless useful to draw on the broader practice of sexual humiliation and sexual abuse to supplement the analysis, due to the comparative dearth of disaggregated information on specifically rectal feedings.

Rectal feeding is just one aspect of the wide range of tactics of sexual humiliation and abuse used in the U.S. interrogation and detention program. Rectal feeding and forced nudity, for example, share striking similarities within the broader context of detainee sexual abuse. Rectal feeding was used when the detainee was not actually being interrogated but was nevertheless part of the interrogation program and process; the Fay-Jones report reveals the same logic in the use of forced nudity as an interrogation technique: detainees were kept naked in their cells at Abu Ghraib to "soften them up for interrogation."⁷⁴ Forced nudity, like rape, is intended to illustrate and widen the power differential between detainees and interrogators, undermine the victim's autonomy, masculinity, and overall sense of self, and convey that the interrogators have "absolute control over the detainees' bodies and can do as they please."⁷⁵

Indeed, given the shared purposes of different forms of sexual abuse, detainees were often subject to both forced nudity and rape, as one former male detainee reported:

⁷³ SENATE TORTURE REPORT, *supra* note 10, at 100, 114-15; CSRT TRANSCRIPTS FOR ISN 10016, *supra* note 45, at 171.

⁷⁴ PHYSICIANS FOR HUM. RTS., *supra* note 1, at 36.

⁷⁵ *Id.* at 11.

[T]he first thing the American soldiers wanted was to show that they were in total control of the situation. After that, they wanted to humiliate us. Yes, humiliation was clearly the objective If they put you naked in front of other people, if they put things up your ass, they can destroy your dignity It's as if they're telling you: 'We're human beings, but you're just animals.'⁷⁶

The limited research on male sexual humiliation has generally focused on its purpose of establishing or emphasizing a power hierarchy between the abuser and the victim; it is explicitly intended to humiliate the victim and make them feel weak.⁷⁷ Clinicians at the Center for Victims of Torture have likewise reported that sexual victimization “emasculates male victims and destroys their sense of identity and autonomy.”⁷⁸ There is evidence that Muslim victims of sexual abuse feel especially “degraded in their manhood” because of their religious beliefs, and that U.S. personnel intentionally subjected detainees to sexual humiliation and abuse because of the heightened suffering it would inflict on Muslim men.⁷⁹ In fact, for many Muslim men, “acceptance of the role of the passive homosexual is considered extremely degrading and shameful because it casts the man or youth into a submissive, feminine role.”⁸⁰

Rectal feeding, therefore, fits squarely into the contemporary understanding of rape as a sexualized attack based on patriarchal and heteronormative norms. Its very purpose in the U.S. interrogation and detention program resides in its power as a form of rape: it is a tactic to degrade, humiliate, and emasculate detainees, while demonstrating and underscoring their powerlessness (gendered feminine) compared to the power (gendered masculine) of the interrogators. Certainly, rectal feeding must be recognized as rape, not only as a necessary step toward any chance of holding the perpetrators responsible and preventing future sexual abuse, but also because of the implications such a recognition has for the

⁷⁶ LAUREL E. FLETCHER & ERIC STOVER, *GUANTÁNAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES* 19 (2008).

⁷⁷ See Michael Peel, *Male Sexual Abuse in Detention*, in *THE MEDICAL DOCUMENTATION OF TORTURE* 179, 189 (Michael Peel & Vincent Iacopino eds., 2002).

⁷⁸ *PHYSICIANS FOR HUM. RTS.*, *supra* note 1, at 57.

⁷⁹ *Id.* at 11, 58 (referencing a statement from the Tipton Three alleging that detainees who were brought up “most strictly as Muslims” were targeted for sexual humiliation).

⁸⁰ *Id.* at 57 (citing RAPHAEL PATAL, *THE ARAB MIND* 134 (2002)).

United States' domestic and international human rights obligations with respect to torture.

IV. SUBJECTING DETAINEES TO RECTAL FEEDING CONSTITUTES TORTURE

The United States has violated its treaty obligations and customary international law by subjecting detainees to rectal feeding through its interrogation and detention program. In this Part, I will provide a survey of the United States' historical precedent of condemning rape as torture (albeit not in this specific context of U.S. perpetrators and male victims). Then, I will demonstrate how rectal feeding, as rape, constitutes torture under the U.S. Extraterritorial Torture Statute (ETS).

a. U.S. Interpretations of Rape as Torture

U.S. legislatures, courts, and administrative bodies have routinely condemned rape and, on several occasions, have indicated that rape may constitute torture. The Torture Victim Protection Act of 1991 (TVPA) and the Torture Victims Relief Act of 1998 (TVRA) both indicate Congress's understanding that rape may constitute torture under international and domestic law.⁸¹ Although these Acts do not specifically apply to the issue at hand,⁸² they are nevertheless illustrative of Congress's intent that rape and other forms of sexual violence are acts of torture. The TVRA's definition of torture "includes the use of rape and other forms of sexual violence by a person acting under the color of law upon another person under his custody or physical control,"⁸³ While not explicitly

⁸¹ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(b), 106 Stat. 73; Torture Victims Relief Act of 1998, Pub. L. No. 105-320, § 3, 112 Stat. 3016.

⁸² See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (creating a private right of action for victims of torture committed "under actual or apparent authority, or color of law, of any foreign nation"); Torture Victims Relief Act of 1998, Pub. L. No. 105-320, § 3, 112 Stat. 3016 (enacted to "provide a comprehensive program of support for victims of torture"); see also, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162, 173-75, 201 (D. Mass. 1995) (providing an example of a TVPA case in which rape constituted torture).

⁸³ Torture Victims Relief Act of 1998, Pub. L. No. 105-320, § 3, 112 Stat. 3016.

stated by Congress, the ETS allows for the prosecution of rape.⁸⁴ This covers torture inflicted by U.S. officials and thus directly applies to rectal feeding.

b. Rape as Torture Under § 2340

The ETS prohibits torture committed by a person acting under color of law against persons within the public official's custody or control, and establishes federal criminal jurisdiction outside of the United States.⁸⁵ Torture here is defined in accordance with the CAT,⁸⁶ pursuant to the Senate's understandings,⁸⁷ to include acts "specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)." ⁸⁸ "[S]evere mental pain or suffering," in turn, is defined, *inter alia*, as "prolonged mental harm caused by or resulting from—the intentional infliction or threatened infliction of severe physical pain or suffering" or "the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality."⁸⁹ This Section will divide the statutory elements into three categories and address them in turn: (1) an act by a person under the color of the law, upon another person within his custody or physical control; (2) the specific intention to inflict; (3) severe physical or mental pain or suffering.

⁸⁴ See 18 U.S.C. § 2340 (2018); RYAN M. McILROY, PROSECUTING RAPE AND OTHER FORMS OF SEXUAL VIOLENCE AS ACTS OF TORTURE UNDER § 2340 (2016).

⁸⁵ 18 U.S.C. § 2340(A) (2018).

⁸⁶ Memorandum from Daniel Levin, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to James B. Comey, Deputy Att'y Gen., Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, 4 (Dec. 30, 2004) [hereinafter The 2004 Memo] (citing *Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004)).

⁸⁷ S. EXEC. REP. NO. 101-30, at 36 (1990); G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) [hereinafter CAT].

⁸⁸ 18 U.S.C. § 2340 (2018).

⁸⁹ *Id.*

i. *Actus Reus, Under Color of Law, and Custody Elements*

Here, the medical officers' administration of the rectal feeding procedure on detainees constitutes an act committed by a person acting under the color of law upon another person within his custody or physical control. Clearly, individuals in detention fulfill the custody requirement. Challenges to the color of law element might involve a claim that the medical officers lacked official or formal capacity, but these challenges would almost certainly fail, as the perpetrators were acting in their official capacity as medical officers of the U.S. government—they acted under the authority of the U.S. government to help carry out the U.S. interrogation and detention program, which at the very least did not oppose the practice of rectal feeding.⁹⁰ Indeed, the CIA's Office of Medical Services Guidelines were distributed to all detention site personnel and tacitly allowed it.⁹¹ Furthermore, U.S. understandings of the CAT found no distinction between "color of law" and "official capacity"; the United States understood the CAT to apply "only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act."⁹² The medical officers carried out rectal feeding in furtherance of the government's objectives, rendering the acts not "wholly private." As these elements are easily met, I will now turn to the next statutory element.

ii. *Specifically Intended to Inflict Severe Physical or Mental Pain or Suffering*

Although torture is a specific-intent crime under both the CAT and the ETS,⁹³ they require different standards of specific intent. While the ETS requires that the perpetrator specifically intend the infliction of severe physical or mental pain or suffering, the CAT's

⁹⁰ OMS GUIDELINES, *supra* note 29, at 10, 22-23 (allowing rectal feeding as a rehydration method).

⁹¹ *Id.*

⁹² S. EXEC. REP. NO. 101-30, at 14 (1990).

⁹³ See generally Oona A. Hathaway, Aileen Nowlan & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791 (2012) (explaining that U.S. and international courts apply the understanding of the specific intent standard for torture).

definition of torture merely requires basic “intentional inflection” of severe pain or suffering “for such purposes as obtaining from him or a third person information or a confession.”⁹⁴ As such, by focusing on the intention to do the act (the infliction of severe pain and suffering) for a prohibited purpose, the mens rea for torture under the CAT extends beyond the *actus reus*, leading some legal scholars to conclude a specific intent requirement.⁹⁵ The U.S. understanding submitted to the CAT—“that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering,”⁹⁶ and “[b]ecause specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention”⁹⁷—initially seems to complicate and narrow the definition of specific intent. However, by examining U.S. legislative history and jurisprudence (which consistently allows the intent requirement to be established based on the circumstantial evidence and in one case ruled that an act constituted torture without an intent analysis⁹⁸), the case of rectal feeding will likely meet this element of torture under the ETS.

The U.S. understanding of the CAT, that an act of torture must be “specifically intended to inflict severe physical or mental pain or suffering,”⁹⁹ came under criticism for appearing to raise the standard for intent set out in the CAT, but both the U.N. Special Rapporteur and the State Department Legal Adviser at the time argued that this understanding was not a modification of the CAT, nor did it go beyond the CAT’s intent requirement.¹⁰⁰ The Senate Executive Report that accompanied the ETS explained that the “requirement of intent is emphasized in Article 1 by reference to illustrative motives for torture The purposes given are not exhaustive [T]hey indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate

⁹⁴ CAT, *supra* note 87, art. 1(1).

⁹⁵ Hathaway, Nowlan & Spiegel, *supra* note 93, at 801, 804.

⁹⁶ S. EXEC. REP. NO. 101-30, at 9 (1990).

⁹⁷ *Id.* at 14.

⁹⁸ *United States v. Belfast*, 611 F.3d 783, 793 (11th Cir. 2010).

⁹⁹ S. Exec. Rep. No. 101-30, at 36 (1990).

¹⁰⁰ The 2004 Memo, *supra* note 86, at 6-7 (citing, *inter alia*, J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 74 (1988)); *Convention Against Torture: Hearing Before the S. Comm. on Foreign Rels.*, 101st Cong. 9-10 (1990).

intention or malice.”¹⁰¹ By consistently denying a heightened intent standard, highlighting the connection between the specific intent standard and the non-exhaustive list of prohibited purposes, and by using the phrase “specific intent” while removing the partial list of prohibited purposes in the statutory text of the ETS, one may reasonably infer that the U.S. understanding of specific intent is no higher than the standard under the CAT and instead aims to account for all motivations underlying torture (in other words, all prohibited purposes).

Despite the notorious ambiguity surrounding the concept of specific intent,¹⁰² U.S. courts have provided sufficient guidance to demonstrate that rape, and specifically the rectal feeding at issue here, meets the definition of torture under the ETS. In *United States v. Bailey*, the Supreme Court found that the definition of both general and specific intent largely vary based on the statute concerned, suggesting the importance of a contextual analysis.¹⁰³ Here, the ETS does not clearly define “specific intent,” and there is similarly limited judicial interpretations on its meaning within the statute. In the first prosecution under the ETS, the Eleventh Circuit investigated the congressional understanding of “specific intent” and concluded that the textual differences between ETS and the CAT were not material.¹⁰⁴ The Court found that in crafting the ETS, Congress merely combined the intent and purpose inquiry set forth in the CAT and thus adopts the same substantive intent standard: “The Torture Act in no way eliminates or obfuscates the intent requirement contained in the offense of torture; instead, the Act makes that requirement even clearer.”¹⁰⁵ The Court further explained: “specific intent” is used to “ensure[] that, whatever [the Act’s] specific goal, torture can occur . . . only when the production

¹⁰¹ S. EXEC. REP. NO. 101-30, at 14 (1990) (citation omitted).

¹⁰² See U.S. DEP’T OF JUST., OFF. OF PRO. RESP., REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 170 (2009) (noting that the Supreme Court has routinely commented on the imprecision of “specific intent”).

¹⁰³ *United States v. Bailey*, 444 U.S. 394, 403-05 (1980) (holding that at least in a “general sense,” “specific intent” requires that one consciously desire the result (quoting WAYNE LAFAVE & AUSTIN W. SCOTT JR., HANDBOOK ON CRIMINAL LAW §28, at 201-02 (1972))).

¹⁰⁴ *United States v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010).

¹⁰⁵ *Id.* at 807.

of pain is purposive, not merely haphazard.”¹⁰⁶ The definition of torture was met in this particular case because it was “undertaken for a particular purpose (to intimidate any possible dissenters . . . and extract information from them).”¹⁰⁷ Based on this analysis of intent, rectal feeding will likely meet the specific intent requirement because of the evidence of its prohibited purposes to intimidate detainees and to facilitate interrogations (or, in other words, to extract information from them).

Given the absence of more judicial interpretations of the specific intent requirement under the ETS, it is useful to supplement the analysis with the application of specific intent in other torture cases, such as those arising under the Alien Tort Statute (ATS) and TVPA.

In both *Filártiga* and *Sosa*, the courts determined whether specific intent was established based on evidence that pain and suffering had been inflicted for a prohibited purpose.¹⁰⁸ In the context of TVPA, which employs the same language for intent as the CAT,¹⁰⁹ courts have similarly evaluated intent based on whether severe pain and suffering were knowingly inflicted for a prohibited purpose. For example, in *Price v. Socialist People’s Libyan Arab Jamahiriya*, the court held that the act’s “purpose of demonstrating Defendant’s support for the government of Iran” did not satisfy the intention requirement because there was no intent to inflict pain and suffering for a prohibited purpose.¹¹⁰ When torture is found under TVPA, courts typically do not make a separate intent analysis but instead infer it from the circumstances, and particularly from the manifest

¹⁰⁶ *Id.* (first alteration in original) (citing *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002)).

¹⁰⁷ *Id.* at 804 n.4.

¹⁰⁸ *Filártiga v. Peña-Irala*, 630 F.2d 876, 883 (2d. Cir. 1980) (decided before ratification of the CAT); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736, 738 (2004) (ruling against a finding of torture).

¹⁰⁹ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(b)(1), 106 Stat. 73, 73 (1992) (defining torture as “any act . . . by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is *intentionally inflicted* on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind” (emphasis added)).

¹¹⁰ 294 F.3d 82, 86, 94 (D.C. Cir. 2002).

evidence of severe pain and suffering.¹¹¹ In *Mehinovic v. Vuckovic*, a case involving both ATS and TVPA claims, the court cited the ICTY's ruling in *Delalic* to support its analysis of the specific intent in torture cases under U.S. law: "There is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for [the specific intent] requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose."¹¹²

Regardless of whether anyone will be held accountable in practice,¹¹³ the case of rectal feeding meets the legal requirement of specific intent as applied under similar torture statutes. Judicial interpretations consistently infer intent by heavily relying on the available circumstantial evidence with respect to whether the perpetrator's motivations were prohibited and the extent to which the infliction of pain and suffering was sufficiently severe. The reports, declassified documents, and testimony relating to rectal feeding in the U.S. interrogation and detention program support a finding that the perpetrators were motivated by prohibited purposes (to intimidate, to humiliate, to facilitate interrogations and thus to extract information), and, as I will show in the next Section, the evidence available also supports a finding that rectal feeding meets the "severe physical or mental pain or suffering requirement" under the ETS.

¹¹¹ See, e.g., *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009) (holding that torture was established based on the "visible signs of torture" on the body of a torture victim); *Kilburn v. Islamic Republic of Iran*, 699 F. Supp. 2d 136, 152 (D.D.C. 2010) (primarily basing a finding of torture on the evidence of "beatings, unsanitary conditions, inadequate food and medical care, and mock executions"); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22 (D.D.C. 2001) (relying on evidence of threats of physical torture without seeking direct evidence on intent); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (holding that the factual circumstances alone were "more than sufficient to establish" torture).

¹¹² *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346 n.26 (N.D. Ga. 2002) (quoting *Prosecutor v. Delalic*, Case No. IT-96-21, Judgment, ¶ 470 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).

¹¹³ As suggested at the outset of this Comment, my analysis acknowledges the political realities and general lawlessness of the United States that prevents holding perpetrators accountable. See, e.g., Warren Strobel & Lawrence Hurley, *Prosecutions for CIA Torture Still Seem Unlikely After Senate Report*, REUTERS (Dec. 9, 2014), <https://www.reuters.com/article/us-usa-cia-torture-accountability-idUSKBN0JN2JQ20141209> [<https://perma.cc/Y56E-838Y>].

iii. *Severe Physical or Mental Pain or Suffering*

Neither the CAT nor the ETS specifically defines “severe” in relation to inflicted pain or suffering. Both the CAT and U.S. understandings of torture find it more egregious than cruel, inhuman, or degrading treatment (CIDT) under the CAT article 16, as not all forms of CIDT reach the level of torture.¹¹⁴ However, both federal and administrative courts have held that acts of rape and sexual assault may constitute torture, and in their analyses imply that rape by its very nature meets the standard of “severe pain and suffering.”

For instance, in *Farmer v. Brennan*, the Supreme Court held that prison officials may be liable for “deliberate indifference” or subjective recklessness to an inmate’s Eighth Amendment right to protection from cruel and unusual punishment, such as rape in custody; Justice Blackmun concurred, stating that prison rape “is nothing less than torture.”¹¹⁵ In *Xuncax v. Gramajo*, the first case brought under the TVPA, the court found that the facts of the case, which included sexual abuse, constituted torture under the Act.¹¹⁶ In *Zubeda v. Ashcroft*, the Third Circuit specifically held that pursuant to the CAT article 3, “[r]ape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity.”¹¹⁷ The *Zubeda* court also cited an unpublished Board of Immigration Appeals decision which likewise held that rape and sexual assault constitute torture under the CAT.¹¹⁸

The United States’ initial and periodic reports and responses to the Committee Against Torture add to this growing body of interpretive texts that understand the definition of torture to include rape, stating that U.S. law prohibits acts that constitute torture “within the meaning of the [CAT],” including “rape, sodomy, and

¹¹⁴ S. EXEC. REP. NO. 101-30, at 13 (1990) (“The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to ‘other acts . . . which do not amount to torture.’ The negotiating history indicates that [the phrase ‘which do not amount to torture’] of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman, and degrading treatment or punishment and that Article 1 should be construed with this in mind.”).

¹¹⁵ 511 U.S. 825, 854 (1994).

¹¹⁶ 886 F. Supp. 162, 174 (D. Mass. 1995).

¹¹⁷ 333 F.3d 463, 472 (3d. Cir. 2003).

¹¹⁸ *Id.* at 473 n.9 (citing *Matter of Kuna*, A76491421 (BIA July 12, 2001) (unpublished decision)).

molestation.”¹¹⁹ Notably, the U.S. initial report in particular references the existence of male victims of rape by citing TVRA provisions on interviewing torture victims, such as “gender-specific training on the subject of interacting with men and women who are the victims of rape.”¹²⁰

In 2002, the Department of Justice (DOJ)’s Office of Legal Counsel (OLC) provided the U.S. Executive Branch with memoranda concerning interrogation standards under the ETS. One of these “torture memos,” the Bybee memo, received substantial public and internal criticism for its findings that torture under the ETS must involve pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹²¹ In response, the OLC issued a memorandum in 2004 that withdrew the Bybee Memo because of, *inter alia*, its questionable and overly narrow statutory analysis of what constituted torture.¹²² However, it is notable that even under the Bybee Memo’s extremely high standard for meeting the definition of torture, it nevertheless recognized that rape may constitute torture:

[I]t is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture. Certain acts . . . , however, . . . are of such a barbaric nature, that it is likely a court would find that allegations of such treatment would constitute torture, [including] rape or

¹¹⁹ See U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶ 101, UN Doc. CAT/C/28/Add.5 (Feb. 9, 2000); U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶ 16, UN Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006); U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, ¶ 9, UN Doc. CAT/C/USA/3-5 (Dec. 4, 2013); UNITED STATES WRITTEN RESPONSE TO QUESTIONS ASKED BY THE COMMITTEE AGAINST TORTURE 25, 51 (Apr. 28, 2006).

¹²⁰ U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶ 225, UN Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

¹²¹ Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Just., to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 1 (Aug. 1, 2002) [hereinafter Bybee Memo].

¹²² The 2004 Memo, *supra* note 86, at 2 (“This memorandum supersedes the August 2002 Memorandum in its entirety.”).

sexual assault, or injury to an individual's sexual organs, or threatening to do any of these sorts of acts¹²³

Although it disagreed with the Bybee Memo's "limiting" definition of "severe" pain under the ETS, the 2004 Memo also noted that beyond the identified points of disagreement, it does not believe that the Bybee Memo's other opinions regarding the treatment of detainees would be inconsistent under the 2004 Memo's legal standards.¹²⁴ As such, the 2004 Memo implied its recognition that rape would likely be found to constitute torture in a court of law.

Furthermore, although the 2004 Memo disagreed with the Bybee Memo's overly narrow view of severe pain or suffering,¹²⁵ the Committee Against Torture still questioned both memoranda's use of the term "extreme,"¹²⁶ to which the United States responded that "extreme" seeks to clarify both the distinction between torture and CIDT and the meaning of "severe" in accordance with the CAT's definition of torture.¹²⁷ The UN Special Rapporteur on Torture reiterated in 2010 that "severity does not have to be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure or impairment of bodily functions or even death, as suggested in the 'torture memos.'"¹²⁸ It is worth noting that the 2004 Memo distinguishes between physical pain and physical suffering, and concludes that under some circumstances "severe physical suffering" may constitute torture even if it does not constitute "severe physical pain."¹²⁹ Severe physical suffering would be "a condition of some extended duration or persistence as well as intensity. . . . [It would not be] merely mild or transitory."¹³⁰ The U.S. understanding of severe physical suffering may therefore include "long-term chronic infections, tumors, abscesses, cysts,

¹²³ Bybee Memo, *supra* note 121, at 24.

¹²⁴ See The 2004 Memo, *supra* note 86, at 2 n.8.

¹²⁵ *Id.* at 2 (citing Bybee Memo, *supra* note 121, at 1, 19).

¹²⁶ U.N. Comm. Against Torture, List of Issues to be Considered During the Examination of the Second Periodic Report, ¶¶ 1, 3, UN Doc. CAT/C/USA/Q/28 (2006).

¹²⁷ UNITED STATES WRITTEN RESPONSE TO QUESTIONS ASKED BY THE COMMITTEE AGAINST TORTURE, *supra* note 119, at 51.

¹²⁸ Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment in the World, Including an Assessment of Conditions of Detention*, ¶ 32, UN Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010).

¹²⁹ The 2004 Memo, *supra* note 86, at 10.

¹³⁰ *Id.* at 12.

infertility, excessive growth of scar tissue, increased risk of HIV/AIDS infection, hepatitis and other blood-borne diseases, damage to the urethra resulting in urinary incontinence . . . painful sexual intercourse, and other sexual dysfunctions,"¹³¹ although these conditions might also raise issues of mental pain or suffering. In the case of rectal feeding, it seems that severe physical suffering will likely occur in some cases, such as when it results in anal fissures, chronic hemorrhoids, and "symptomatic rectal prolapse."¹³²

Even though legal analyses addressing the intersection of rape and torture have generally avoided addressing under what conditions rape would not meet the severity requirement or disentangling physical and mental suffering, the majority of interpretations suggest that rape may necessarily meet the "severe physical or mental pain or suffering" standard by its very nature. Even so, its fulfillment of this element is most forcefully demonstrated through an analysis of severe mental pain or suffering.

1. *Severe Mental Pain or Suffering*

Although the CAT article 3 and the ETS provide for the same prolonged mental harm requirement, neither specifically defines prolonged mental harm.¹³³ The 2004 Memo concluded that the phrase does not appear in the relevant medical literature or any federal code and proposed that mental harm must be of some lasting duration to be "prolonged," thereby rejecting the Bybee Memo's conclusion that it must be at least "months or even years."¹³⁴ The Senate Executive Report attached to the CAT held that because mental pain or suffering is comparatively more subjective than physical suffering, severity determinations should also consider objective criteria, such as the degree to which the act was cruel or

¹³¹ MCILROY, *supra* note 84, at 25 (citing Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development* ¶ 50-51, UN Doc. A/HRC/7/3 (Jan. 15, 2008)).

¹³² SENATE TORTURE REPORT, *supra* note 10, at 100.

¹³³ CAT, *supra* note 87, art. 3; 18 U.S.C. § 2340.

¹³⁴ The 2004 Memo, *supra* note 86, at 14.

inhuman.¹³⁵ This guidance reinforces the notion that rape inherently meets the severity requirement.

Indeed, U.S. courts have routinely found that rape constitutes severe mental pain or suffering.¹³⁶ In *Doe v. Constant*, the court found that the plaintiff suffered from “physical and psychological suffering” after, *inter alia*, being raped on multiple occasions, and consequently experiencing shame, fear, social isolation, PTSD, insomnia, nightmares, flashbacks, and difficulty concentrating.¹³⁷ In *Zubeda v. Ashcroft*, the court also found that the plaintiff had suffered from prolonged mental harm in its holding that rape may constitute torture under the CAT.¹³⁸ Of course, in these cases and other torture cases involving sexual abuse, rape is by no means the only allegation. It is thus difficult to determine the extent to which courts consider rape as fulfilling the severity requirement.

In the absence of more domestic cases echoing that rape constitutes torture, it is useful to supplement the analysis with international jurisprudence, which provides persuasive authority on rape’s inherent severity. International tribunals and human rights courts have had more opportunities to recognize the extent to which rape and sexual violence result in psychological consequences and mental harm, although the cases are unsurprisingly gender-segregated. The UN Special Rapporteur on Torture reported that, worldwide, sexual violence results in social stigma and isolation that is exacerbated when inflicted by the victim’s government: “Because of the stigma attached to sexual violence, official torturers deliberately use rape to humiliate and punish victims but also to destroy entire families and communities.”¹³⁹ Similarly, in *P. and S. v. Poland*, the European Court of Human Rights (ECHR) found that “the general stigma” attached to sexual violence caused “much distress and suffering,

¹³⁵ See S. EXEC. REP. NO. 101-30 (1990).

¹³⁶ See, e.g., *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601 (E.D. Pa. 2003) (holding that the Immigration Judge and Board of Immigration Appeals erred by focusing exclusively on physical pain or suffering and disregarding prolonged mental harm).

¹³⁷ *Doe v. Constant*, 2006 U.S. Dist. Lexis 101961 (S.D.N.Y. Oct. 24, 2006).

¹³⁸ 333 F.3d 463, 467-73 (3rd Cir. 2003).

¹³⁹ MCILROY, *supra* note 84, at 28-29 (citing Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development* ¶ 50-51, UN Doc. A/HRC/7/3 (Jan. 15, 2008)).

both physically and mentally.”¹⁴⁰ In *Aydin v. Turkey*, the ECHR held that “[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim.”¹⁴¹

In *Delalic*, the ICTY held: Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.¹⁴² In *Zelenovic*, the sentencing judgment explicitly stated that torture by means of rape was an especially serious crime, adding, “rape is an inherently humiliating offence and that humiliation is always taken into account when appreciating the inherent gravity of th[e] crime.”¹⁴³ In *Kunarac*, the ICTY concluded that acts of rape

establish *per se* the suffering of those upon whom they were inflicted. . . . Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental [and therefore] [s]evere pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering[] . . . [w]hether physical or mental.¹⁴⁴

In the international legal landscape, courts are consistent with U.S. jurisprudence, but more emphatic in finding that rape *per se* constitutes “severe pain or suffering” without separately analyzing whether it is physical or mental. Given the comparative lack of domestic jurisprudence addressing rape as a form of torture, these cases are critical to analyzing the legal standard for severe pain and suffering. When analyzing the severity requirement with the complementary interpretation of international human rights courts and ad hoc tribunals, it becomes clear that rectal feeding satisfies this

¹⁴⁰ App. No. 57375/08, ¶ 76 (Oct. 30, 2012), <http://hudoc.echr.coe.int/fre?i=001-114098> [<https://perma.cc/EG8W-FP5R>].

¹⁴¹ No. 57/1996/676/866, ¶ 83 (Sept. 25, 1997), <http://hudoc.echr.coe.int/fre?i=001-58371> [<https://perma.cc/FSL8-K4US>].

¹⁴² Prosecutor v. Delalic, Case No. IT-96-21, Judgment, ¶ 495 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

¹⁴³ Prosecutor v. Cesic, Case No. IT-95-10/1-S, Sentencing Judgement, ¶ 53 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2004).

¹⁴⁴ Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgement, ¶¶ 150-51 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

requirement—and if not domestically, then certainly under customary international law. Therefore, rectal feeding is likely to meet the legal requirements of torture under U.S. law.

V. CONCLUSION

Although rectal feeding likely meets the legal standards under the ETS, it is unlikely that this conclusion will be tested in court. In fact, the ambiguities that exist in determining whether or not rectal feeding would meet the ETS's statutory definition of torture can be traced to the original problem: the unacknowledged truth that rectal feeding is rape. If this fundamental premise is sufficiently disputed, both the specific intent and severity requirements are cast into doubt if not wholly destroyed.

Because rape is largely assumed to be something that happens to women but not men, and because women are “effectively defined as nonhuman, subhuman . . . beings whose reality of violation, to the extent it is somehow female, floats beneath international legal space,” rape as a form of torture done to men has not been adequately addressed.¹⁴⁵ When human rights courts have recognized that rape constitutes torture, it has almost always been in cases in which the women are the victims—this is especially true for cases that most emphatically condemn rape as a *per se* act of torture.

The masculinist logic that has historically been used to argue that men cannot be raped is the very same logic that threatens to exclude this form of rape from understandings of torture. It follows the globally dominant, Aristotelian approach to equality, which treats likes alike and unalikes unlike; under this theory of equality, (re)conceptualizing an individual who is subjected to unequal treatment as an “unlike” is theoretically as equal as “elevating the denigrated to the level of the dominant standard set by the privileged.”¹⁴⁶ In practice, “to be an equal, you must be the same as whoever sets the dominant standard.”¹⁴⁷ As the men setting the dominant standard do not need effective laws against rape, the lack of such laws for women or for men who are degraded to the level of women or lower is not an inequality; it is permitted as simply

¹⁴⁵ MACKINNON, *supra* note 7, at 142.

¹⁴⁶ *Id.* at 26.

¹⁴⁷ *Id.*

treating unalikes unlike. Acknowledging rectal feeding as what it is seeking to challenge this through contributing to the growing consensus on what constitutes rape and providing protection for unalikes — both women and men.